No. 76-750

In the Supreme Court of the United States

OCTOBER TERM, 1977

SEARS, ROEBUCK AND CO., PETITIONER

v.

SAN DIEGO COUNTY DISTRICT COUNCIL OF CARPENTERS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD AS AMICUS CURIAE

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INTEREST OF THE NATIONAL LABOR RELATIONS BOARD

The question presented is whether the National Labor Relations Act (NLRA) preempts a state court trespass action to enjoin peaceful picketing, conducted on the privately owned sidewalks and parking lot adjacent to a retail store, which is arguably either prohibited by Section 8 or protected by Section 7 of the NLRA. Similar questions were pre-

sented, but not reached by the Court, in *Meat Cutters* v. *Fairlawn Meats*, 353 U.S. 20; *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308; and *Taggart* v. *Weinacker's, Inc.*, 397 U.S. 223. The Board filed briefs *amicus curiae* in each of these cases.

The National Labor Relations Board (the Board) is responsible for administering the NLRA and implementing the national labor policy adopted by Congress therein. The NLRA protects the right to picket in connection with a labor dispute, but also proscribes or limits such picketing in certain circumstances. The Board therefore has an important interest in the proper application of preemption principles to state regulation of picketing in order to preclude interference with the uniform administration of federal law through the use of conflicting state rules and remedies.

STATEMENT

Sears, Roebuck and Co. (Sears) operates a retail department store in Chula Vista, California. The store building is centered on a large, rectangular-shaped piece of land. Walkways abut the building on all four sides; they in turn are surrounded by a large parking area. The land on which the store, the walkways, and the parking area are located is owned by Sears. The external limits of the Sears property are bounded on three sides by public sidewalks and streets,[1] and on the fourth by private residences sep-

[1] The building is located 220 feet from 5th Avenue, 228 feet from H Street, and 490 feet from I Street (Pet. App. A5).

arated from the property by a concrete wall. Sears' store is the only building on the property. (Pet. App. A31.)

On October 24, 1973, Business Representatives Floyd Cain and Dallas Roose of San Diego District Council of Carpenters (the Union) went to the Sears store to verify information conveyed by a Union member that certain carpentry work was being performed there (App. 17-18). The business agents were informed by the store security manager that the work—remodeling the women's fashions department—was being done by Sears' employees (App. 12). Later that day, Cain and Roose met with store manager Joe Ochoa. Cain "explained to him that the work being performed was carpenter work and that the particular carpenter at the job had not been dispatched by our hiring halls and that other workers performing other work at their store were clerical workers in the store by their own admission" (App. 18). Roose and Cain asked Ochoa "either to contract the work through a bona fide building trades contractor who would in turn utilize qualified and dispatched carpenters to perform the carpenter work in question; or in the alternative to sign a short form agreement which would require Sears to abide by the terms of the master contract agreement with regard to the dispatch and use of carpenters in completing the construction on that job" (*ibid.*). Ochoa promised to look into the matter and give the business agent an answer the next day, but he failed to do so (*ibid.*).

On the morning of October 26, the Union began to picket on Sears' property. Five pickets patrolled on the parking lot areas immediately adjacent to the walkways abutting the sides of the building. They carried signs indicating that they were AFL-CIO pickets sanctioned by the "Carpenters' Trade Union." The store security manager told the pickets that they were on Sears' private property and requested that they leave and picket on the public sidewalks. The pickets initially complied with the request and removed their picketing to the public sidewalks abutting the Sears property. However, about an hour later, on Business Representative Roose's instruction, they returned to the parking lot and resumed picketing there (App. 13). Roose told the security manager that "the parking area * * * was a public thoroughfare and his pickets did not have to leave"; they would not leave unless compelled to do so by "legal action" (App. 14). The pickets conducted themselves in a peaceful and orderly fashion, and there was no obstruction of traffic (Pet. App. A32).

On October 29, Sears filed suit in a state court for injunctive relief on the theory that the picketing constituted a continuing trespass on its property (App. 1-6). The same day the court issued an *ex parte* temporary restraining order, enjoining the Union from picketing on Sears' property (App. 10-11).[2] On November 21, the court, after hearing, issued a preliminary injunction to the same effect; the injunction expressly excepted the public sidewalks adjacent to Sears' property (App. 34-35). The California Court of Appeal, Fourth Appellate District, sustained the injunction (Pet. App. A4-A13, A14-A30).

[2] After issuance of the restraining order, the Union moved its pickets to the public sidewalks. But two weeks later it stopped the picketing, allegedly because of its ineffectiveness (App. 19, 28; Pet. App. A5, A33).

The Supreme Court of California reversed (Pet. App. A31-A46). The court pointed out that *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, " 'established the general principle that the [Act] pre-empts state and federal court jurisdiction to remedy conduct that is arguably protected or prohibited by the Act' " (Pet. App. A35). It found that the Union's picketing here was arguably either "area standards" picketing protected by Section 7 of the NLRA, 29 U.S.C. 157 (Pet. App. A36), or recognitional picketing regulated by Section 8(b)(7)(C) of the Act, 29 U.S.C. 158(b)(7)(C) (Pet. App. A37-A39).

The court held that the conclusion of preemption that follows from these findings is not affected by the fact that the picketing was conducted on private property. It pointed out that union activity does not fall outside the protection of Section 7 merely because it occurs on private property; it is the task of the Board to make an " '[a]ccommodation between [section 7 rights and private property rights] with as little destruction of one as is consistent with the maintenance of the other' " (Pet. App. A36, quoting from *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 112). Accordingly, to leave the State free to regulate under its trespass law the type

of picketing involved here would present a real danger of subverting the uniformity Congress envisioned for the federal regulatory program. The court therefore held the *Garmon* rationale for finding federal preemption to be equally valid here. (Pet. App. A44-A45.)

ARGUMENT

INTRODUCTION AND SUMMARY

In *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 244, this Court enunciated the principle that:

> When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law. Nor has it mattered whether the States have acted through laws of broad general application rather than laws specifically directed toward the governance of industrial relations. Regardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes. [Footnote omitted.]

But, as the Court recently noted in *Farmer* v. *United Brotherhood of Carpenters*, No. 75-804, decided March 7, 1977, slip op. 5-6, "the same considerations that underlie the *Garmon* rule have led the Court to recognize exceptions in appropriate classes of cases" (footnote omitted). These exceptions " 'in no way undermine the vitality of the preemption rule' * * *. To the contrary, they highlight [the Court's] responsibility in a case of this kind to determine the scope of the general rule by examining the state interests in regulating the conduct in question and the potential for interference with the federal regulatory scheme" (*id.* at 7).

We submit that the picketing here was arguably either restricted by Section 8 or protected by Section 7 of the NLRA, and that, although there is a substantial state interest in prohibiting such picketing because it occurred on private property, the potential for interference with the federal regulatory scheme is too great to warrant an exception to *Garmon* permitting such state regulation where, as here, that property is open to the public. This is not a case in which the parties had no available means of obtaining a Board determination of the legality of the picketing; accordingly, the preemption of state regulation will not leave the employer without a remedy.

THE NLRA PREEMPTS A STATE COURT TRESPASS ACTION BROUGHT TO ENJOIN PEACEFUL PICKETING WHICH IS ARGUABLY EITHER PROHIBITED BY SECTION 8 OR PROTECTED BY SECTION 7 OF THE NLRA

A. The picketing here was arguably either restricted by Section 8 or protected by Section 7 of the NLRA

1. As the court below found, "the Union, prior to instituting picketing, requested that Sears contract

its work through a building trades contractor who would employ carpenters dispatched from [the] Union's hiring hall or, in the alternative, sign an agreement with the Union by which Sears would be bound to hire through the Union's hiring hall at prevailing wage scales" (Pet. App. A35). On these facts, the Board could have found that the Union's object in picketing Sears was to compel it to reassign the carpentry work, which it had given to its own employees (*supra*, p. 3), to members of the Union. Had the Board so found, the Union's picketing would have violated Section 8(b)(4)(D) of the NLRA, 29 U.S.C. 158(b)(4)(D),[3] which prohibits a union from seeking to force a reassignment of work, not only where the work is being performed by another union, but also where it is currently being performed by the employer's own unrepresented employees. *International Brotherhood of Electrical Workers, Local 24 (General Electric)*, 207 NLRB 337, 338-339.

Alternatively, as the court below noted (Pet. App. A37), the Board could have found that the Union was picketing for a recognitional object, and that continued picketing would be subject to the restrictions of Section 8(b)(7)(C) of the NLRA, 29 U.S.C. 158(b)(7)(C). That Section makes it an unfair

[3] That Section prohibits a union from exerting economic pressure with an object of "forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class * * *."

labor practice for a union to picket for a recognitional object for more than 30 days without filing with the Board a petition for a representation election. *Carpenters Local 1260 (Selzer Construction Co.)*, 210 NLRB 628, 630-631, enforced, 90 LRRM 2891 (C.A. 8).

2. On the other hand, the Board could have found that the Union's object was solely to compel compliance with area standards, and that such picketing is protected by Section 7 of the NLRA. *United Brotherhood of Carpenters, Local 480 (National Mill Designs, Inc.)*, 209 NLRB 921. As the court below correctly pointed out (Pet. App. A36), that protection would not be lost merely because the picketing was "engaged in upon Sears' private property and, being without Sears' permission or approval, [was] consequently of a trespassory nature." In *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105, *Central Hardware Co.* v. *National Labor Relations Board*, 407 U.S. 539, and *Hudgens* v. *National Labor Relations Board*, 424 U.S. 507, this Court recognized that, in certain circumstances, employees and their union representatives would have a Section 7 right to carry

[4] If the Board found that the Union's object was to compel Sears to sign a contract containing a union security clause, the Union's picketing for such a contract might also violate Section 8(b)(2) of the Act, 29 U.S.C. 158(b)(2). That Section prohibits a union from causing or attempting "to cause an employer to discriminate against an employee in violation of" Section 8(a)(3), 29 U.S.C. 158(a)(3). See *San Diego Building Trades Council* v. *Garmon*, *supra*, 359 U.S. at 237-238; *National Labor Relations Board* v. *Denver Building & Construction Trades Council*, 192 F.2d 577 (C.A. 10).

on organizational and other concerted activity on private property. Defining the scope of the right requires an "[a]ccommodation between [Section 7 rights and property rights] with as little destruction of one as is consistent with the maintenance of the other." *Babcock & Wilcox Co., supra*, 351 U.S. at 112. As the Court added in *Hudgens, supra*, 424 U.S. at 522: "The locus of that accommodation * * * may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context. In each generic situation, the primary responsibility for making this accommodation must rest with the Board in the first instance."

The Board's supplemental decision in *Hudgens*, 239 NLRB No. 73, issued June 23, 1977 (App., *infra*) indicates the considerations that are relevant to this accommodation. There the Board held that Section 7 of the NLRA gave Butler's warehouse employees, who were engaged in an economic strike, the right to picket Butler's retail store in a shopping center owned by Hudgens, for the purpose of appealing to Butler's customers not to patronize the store. Rejecting Hudgens' contention that, "if television, radio, and newspaper advertising is available, the picketers' Section 7 rights must yield to property rights," the Board found that such mass media "are not 'reasonable' means of communication for employee pickets seeking to publicize their labor dispute with a single store in the Mall" (App., *infra*, pp. 11a-12a). Furthermore, to confine the strikers to these alternatives "would under-

cut Board and Court precedent recognizing and protecting * * * picketing [at the situs of the dispute] as the most effective way of reaching those who would enter a struck employer's business, including situations in which the entrance to the employer's property is on land owned by another," citing *United Steelworkers of America* v. *National Labor Relations Board (Carrier Corporation)*, 376 U.S. 492, 499 (App., *infra*, p. 12a). The Board also rejected "Hudgens' suggestion that the pickets could have used public streets and sidewalks," in view of the facts, *inter alia*, "that the closest public area * * * is 500 feet away from the store, and that a message announced orally or by picket sign at such a distance from the focal point would be too greatly diluted to be meaningful" and, in the circumstances of the case, would present a safety hazard (App., *infra*, p. 13a).

Under the reasoning of this decision, it is at least arguable that, if the object of the Union picketing here were to appeal to consumers not to patronize Sears because it was using substandard carpenter labor, the Board would find that Section 7 of the NLRA afforded the Union the right to conduct that picketing on Sears' parking lot and walkways. The picketing, though engaged in by nonemployees who were protesting substandard conditions rather than employees who were furthering an economic strike, nonetheless would be for an object protected by Section 7. The fact that Sears' store was the only store on the property would make it easier than it would be in the multi-store shopping center involved in *Hudgens* to identify Sears'

customers. Nevertheless, if the pickets were relegated to the public sidewalks surrounding Sears' parking lot, they would be at least 200 feet from the store (note 1, *supra*). Accordingly, as in *Hudgens*, their message would have had to "be read by those to whom [it was] directed either at a distance so great as to render [it] indecipherable" (*Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308, 322), or while their attention was focused on driving onto the property and finding a parking space.[5]

B. The State's interest in applying its trespass laws does not justify an exception to the *Garmon* rule in the situation here

In *Farmer* v. *United Brotherhood of Carpenters*, *supra*, the Court set out the areas in which exceptions to *Garmon* have been recognized (slip op. 6):

> We have refused to apply the pre-emption doctrine to activity that otherwise would fall within the scope of *Garmon* if that activity "was a merely peripheral concern of the Labor Management Relations Act * * * [or] touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." *Garmon*, 359 U.S., at 243-244. See, e.g., *Linn* v. *Plant Guard Workers*, 383 U.S. 53 (1966) (malicious libel); *Automobile Workers* v. *Russell*, 356 U.S. 634 (1958) (mass picketing and threats of violence); *International Association of Machinists* v. *Gonzales*, 356 U.S. 617 (1958) (wrongful expulsion from union membership). We also have refused to apply the pre-emption doctrine "where the particular rule of law sought to be invoked before another tribunal is so structured and administered that, in virtually all instances, it is safe to presume that judicial supervision will not disserve the interests promoted by the federal labor statutes." *Motor Coach Employees* v. *Lockridge*, 403 U.S., at 297-298. See *Vaca* v. *Sipes*, 386 U.S. 171 (1976) (duty of fair representation cases). [Footnotes omitted.]

[5] Moreover, in contrast to *Hudgens*, where the picketing impinged on the interests of the shopping center owner with whom the union had no direct dispute, the picketing here affected only Sears, with whom the Union has its labor dispute.

In *Farmer*, the Court added another exception—the intentional infliction of emotional distress by outrageous conduct.

Contrary to petitioner's contention (Br. 11-14), the reasons for these exceptions do not exist here.[6] The activity here—peaceful picketing—clearly is not "a merely peripheral concern" of the NLRA. It is a subject that Congress, in the NLRA, regulated in a comprehensive manner.[7] And where, as here, such picketing occurs on private property that is open to the

[6] Although various factors negating federal preemption have been separately identified, this Court's holdings that state courts retain the power to regulate certain labor-related conduct have turned on analysis of the entire situation. It is thus doubtful that any single factor would be sufficient by itself to negate federal preemption (cf. *Farmer*, *supra*, slip op. 11). In any event, none of these factors is present here.

[7] See *Garner* v. *Teamsters Union*, 346 U.S. 485, 487-489, 499-500; *San Diego Building Trades Council* v. *Garmon*, *supra*, 359 U.S. at 237-238, 245.

public, state regulation of peaceful picketing would not be justified on the ground that protection of private property from trespass is an interest "deeply rooted in local feeling and responsibility." The protection of an owner's right to prevent trespasses is obviously a matter of substantial local concern.[8] But that right is not absolute; and, indeed, the NLRA is in significant part designed precisely to limit that right (at least where, as here, no significant interference with privacy interests is involved). See, *e.g.*, *National Labor Relations Board* v. *Babcock & Wilcox Co.*, *supra*, 351 U.S. at 112.

Finally, this is not a situation in which federal preemption need not be invoked because there is "no risk that permitting the state cause of action to proceed would result in state regulation of conduct that

[8] In determining whether the state interest is so substantial that Congress should be presumed to have left the matter to the States, the conclusions of the state courts that have considered this matter are particularly relevant. They are not in accord (see cases cited at Pet. 6-8, nn. 2, 3 and see *Shirley* v. *Retail Store Employees Union*, 565 P.2d 585 (Kan. Sup. Ct.); *Commonwealth* v. *Noffke*, Mass. App. Ct., decided July 8, 1977, 46 U.S.L.W. 2024). But since the state courts can be expected to be especially sensitive to the need to protect state interests, the fact that several state courts, like the court below (Pet. App. A39-A44), have concluded that no interests "deeply rooted in local feeling or responsibility" are threatened by federal preemption of the regulation of peaceful picketing on private property strongly suggests that there is no generally recognized deeply rooted state interest in this area. Moreover, the lack of state court concensus on this matter similarly suggests that it would be inappropriate to infer that this is one of those fundamental state interests that Congress must have intended to leave the States free to protect when it enacted the NLRA.

Congress intended to protect." *Farmer* v. *United Brotherhood of Carpenters*, *supra*, slip op. 7. Here, that risk is substantial in view of the delicate accommodation between employee rights and property rights required of the Board in determining whether Section 7 of the NLRA would entitle the employees or their union representative to picket peacefully on private property.[9] And the risk is enhanced by the fact that state trespass laws are not "so structured and administered that * * * it is safe to presume that [their application] will not disserve the interests promoted by the [NLRA]." *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 297-298.[10]

[9] The State would, under its police powers, have power to regulate picketing occurring on private property or elsewhere, insofar as it resulted in violence or obstructed traffic. See *Allen-Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U.S. 740.

Moreover, since picketing within the store is clearly not protected by Section 7 of the NLRA (see *Marshall Field & Co.* v. *National Labor Relations Board*, 200 F. 2d 375 (C.A. 7)), the State would be free to enjoin such picketing, contrary to petitioner's suggestion (Br. 15-16).

[10] State trespass laws seek to vindicate a property owner's right to use his property as he sees fit and open it only to those he chooses to invite. Because they are not designed to accommodate other competing interests, those laws may frequently conflict with rights protected by the NLRA (see *supra*, pp. 9-12).

The fact that state trespass laws have general applicability and are not specifically directed toward the regulation of labor relations is not a sufficient reason to exempt their application to labor disputes from the *Garmon* preemption principle. See *Farmer*, *supra*, slip op. 9; *Garmon*, *supra*, 359 U.S. at 244.

Nor is it an acceptable alternative (see Pet. Br. 16-17) to permit the state court to enjoin the picketing on trespass grounds pending a Board determination of whether the picketing is protected by Section 7, and then vacate the state court injunction should the Board find the picketing protected. Experience with the use of injunctions in labor disputes teaches that such a temporary restraint would tend so to weaken the position of the union and its supporters that, by the time it were lifted, their Section 7 right to picket on the property would have little vitality. See Frankfurter and Greene, *The Labor Injunction* 200-201 (1930).

C. An exception to the *Garmon* rule is not warranted because of any inadequacy of Board processes to resolve the respective rights of the pickets and the property owner

In his concurring opinion in *International Longshoremen's Association, Local 1416* v. *Ariadne Shipping Co.*, 397 U.S. 195, 201-202, Mr. Justice White indicated that, where picketing clearly was not proscribed by Section 8, he would be willing to find that it was immune from state control only if the activity was "actually, rather than arguably, protected under federal law." For, "an employer faced with 'arguably protected' picketing is given by the present federal law no adequate means of obtaining an evaluation of the picketing by the NLRB. The employer may not himself seek a determination from the Board and is left with the unsatisfactory remedy of using 'self-help' against the pickets to try to provoke the union to charge the employer with an unfair labor practice."

And see *Motor Coach Employees* v. *Lockridge*, *supra*, 403 U.S. at 325-331 (White, J., dissenting). Cf. *Taggart* v. *Weinacker's, Inc.*, 397 U.S. 223, 227 (Burger, C.J., concurring). We submit that these considerations do not warrant an exception to the *Garmon* rule here.

First, since the union's activity here was arguably prohibited by Section 8 of the NLRA (see *supra*, pp. 7-9), Sears could have filed a charge with the Board's General Counsel alleging that the picketing violated the Act. If the General Counsel found reasonable cause to believe that the charge had merit, he would have issued a complaint so that the matter could be adjudicated by the Board. Pending such Board determination, he would have had power, under Sections 10 (*l*) and 10(j) of the NLRA, 29 U.S.C. 160 (*l*) and 160(j), to petition an appropriate federal district court for a temporary injunction enjoining the picketing. If the Board sustained the complaint and the Union refused to comply with the Board's order, the Board could then apply to the appropriate court of appeals, under Section 10(e) of the Act, 29 U.S.C. 160(e), for enforcement of that order.

Second, if the General Counsel had refused to issue a complaint on a charge alleging that the picketing violated Section 8 of the NLRA, Sears would not have been required to resort to further self-help in order to furnish the Union with grounds for charging Sears with an unfair labor practice and thereby triggering a Board determination of whether the picketing was in fact protected by Section 7. Section 8(a)(1) of the

NLRA, 29 U.S.C. 158(a)(1), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Sears' act of informing the pickets that they were not permitted to picket on its property would constitute a sufficient interference with rights arguably protected by Section 7 to warrant the General Counsel, had a charge been filed by the Union, in issuing a Section 8(a)(1) complaint against Sears. Cf. *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793, 795; *National Labor Relations Board* v. *Illinois Tool Works*, 153 F. 2d 811, 813-814 (C.A. 7) (employer violates Section 8(a)(1) by banning union solicitation by employees on company property during their nonworking time)."

On the facts of this case there were thus procedures available by which either party could have sought a Board determination of the legality of the picketing under the NLRA. Sears should not be heard to complain that the Union failed to utilize those procedures when it also failed to do so.

Moreover, even if a Board determination of the legality of the picketing could not readily be obtained, that would not warrant creating an exception to the

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" The protection of Section 7 is not limited to labor disputes involving employees of the particular employer against whom the picketing is directed. See Sections 2(3) and 2(9) of the NLRA, 29 U.S.C. 152(3) and 152(9). Thus, if the pickets here were protesting against substandard wages that threatened their own job interests, there clearly was a labor dispute within the meaning of the Act.

Garmon rule. As Mr. Justice Harlan stated in his separate opinion in *Taggart* v. *Weinacker's, Inc.*, *supra*, 397 U.S. at 230:

> While I recognize The Chief Justice's and Mr. Justice White's concern over the hiatus created when the Board does not or cannot assert its jurisdiction * * * that consideration is foreclosed, correctly in my view, by *Garmon*. Congress in the National Labor Relations Act erected a comprehensive regulatory structure and made the Board its chief superintendent in order to assure uniformity of application by an experienced agency. Where conduct is "arguably protected," diversity of decisions by state courts would subvert the uniformity Congress envisioned for the federal regulatory program. In the absence of any further expression from Congress I would stand by *Garmon* and foreclose state action with respect to "arguably protected activities," until the Board has acted, even if wrongs may occasionally go partially or wholly unredressed.

CONCLUSION

The judgment of the Supreme Court of California should be affirmed.

Respectfully submitted.

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AUGUST 1977.

APPENDIX

FJPMW
D—2607
Decatur, Ga.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 10—CA—8823

SCOTT HUDGENS

and

LOCAL 315, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION; AFL-CIO

SECOND SUPPLEMENTAL DECISION AND ORDER

On August 16, 1971, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding,[1] finding that Respondent (hereinafter also called Hudgens), had violated Section 8(a)(1) of the National Labor Relations Act, as amended, by threatening to cause the arrest of the Charging Party's pickets, employees of the Butler Shoe Company, while they were engaging in protected activity under Section 7 of the Act and ordering that Respondent cease and desist therefrom and take certain affirmative action. In concluding that Hudgens had

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[1] 192 NLRB 671.

violated Section 8(a)(1) of the Act, the Board relied primarily on the Supreme Court's *Logan Valley* decision.[2]

Thereafter, Respondent filed a petition for review and the Board filed a cross-petition for enforcement of its order with the United States Court of Appeals for the Fifth Circuit. While the case was before the court of appeals, the Supreme Court issued its decisions in *Central Hardware Co.* v. *N.L.R.B.*[3] and *Lloyd Corp., Ltd.* v. *Tanner*.[4] Thereafter, the Board moved the court of appeals to remand the case so that the Board might reconsider the merits of the question raised in light of those two decisions.

After the remand. the Board ordered a hearing and on April 9, 1973, Administrative Law Judge Thomas A. Ricci issued his Decision, concluding that Hudgens violated Section 8(a)(1) of the Act. In reaching this conclusion, the Administrative Law Judge found that under the balancing test enunciated by the Supreme Court in *N.L.R.B.* v. *The Babcock & Wilcox Company*,[5] the "Union had no other reasonable access to Butler's customers coming to the DeKalb shopping center." The Administrative Law Judge also, however, cited the *Logan Valley* description of

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[2] *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968).

[3] 407 U.S. 539 (1972).

[4] 407 U.S. 551 (1972).

[5] 351 U.S. 105 (1965).

shopping malls as "functional equivalents" of business districts as a "realistic view of the facts."

On August 21, 1973, the Board issued a Supplemental Decision and Order[6] adopting the Administrative Law Judge's conclusion that Hudgens violated Section 8(a)(1) of the Act, but stating that "[w]hile we agree with the Administrative Law Judge's recommendation that we reaffirm our earlier decision, we do so for the reasons specifically set forth in *Frank Visceglia and Vincent Visceglia, t/a Peddie Buildings*."[7]

Hudgens again petitioned for review in the Court of Appeals for the Fifth Circuit, and on September 25, 1974, that court enforced the Board's Order.[8] However, rather than affirming the Board's reliance on *Peddie Buildings*, the court noted that in both *Babcock & Wilcox* and *Central Hardware*, the Supreme Court "limited its consideration to organizational cases," and suggested that "[a]lthough the consideration of alternatives required by *Babcock & Wilcox* is relevant to proper resolution of today's case, it is not the complete answer in consumer picket-

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[6] 205 NLRB 628 (1973).

[7] 203 NLRB 265 (1973), enforcement denied 498 F.2d 43 (C.A. 3, 1974). In *Peddie*, the Board affirmed an Administrative Law Judge's finding that the respondent had violated Sec. 8(a)(1) in circumstances similar to those here, but, in view of the Supreme Court's decision in *Central Hardware, supra*, which issued after the Administrative Law Judge's Decision, disavowed his reliance on *Logan Valley* and instead relied solely on *Babcock & Wilcox*.

[8] 501 F.2d 161.

ing cases."[9] Stating that the Supreme Court's rationale in *Lloyd Corporation* is "fully applicable here," the court held that:

> *Lloyd* burdens the General Counsel with the duty to prove that other locations less intrusive upon Hudgens' property rights than picketing inside the mall were either unavailable or ineffective.[10]

In affirming the Board's Supplemental Decision and Order, the court concluded that that burden had been met.

On March 3, 1976, the Supreme Court, holding that no first amendment issues were involved, reversed the court of appeals [11] and remanded the case to the court of appeals with directions to remand to the Board for consideration of the issues solely "under the statutory criteria of the National Labor Relations Act." [12] The court of appeals remanded the case to the Board on April 21, 1976.

On May 11, 1976, the Board invited the parties to file further statements of position. Subsequently, statements of position were filed by the General Counsel, by Respondent, and by the Charging Party, hereinafter called the Union.

Pursuant to the Court's remand, the Board has reconsidered its Supplemental Decision and Order, the

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[9] *Id.* at 166.

[10] *Id.* at 169.

[11] 424 U.S. 507.

[12] *Id.* at 523.

statements of position, and the entire record in this case, and hereby reaffirms, for the reasons set forth below, its conclusion that Respondent violated Section 8(a)(1) of the Act.

The Supreme Court majority in *Hudgens* held that persons entering a private shopping center do not have a first amendment right to engage in activity which would be accorded first amendment protection in public places. Therefore, if there is such a "right," it must have a source other than the Constitution. Accordingly, in remanding the case to the Board, the Court made it clear that any "rights and liabilities of the parties . . . are dependent exclusively upon the National Labor Relations Act." [13]

The facts in this case, essentially undisputed, were summarized by the Supreme Court as follows:

> The petitioner, Scott Hudgens, is the owner of the North DeKalb Shopping Center, located in suburban Atlanta, Ga. The center consists of a single large building with an enclosed mall. Surrounding the building is a parking area which can accommodate 2,640 automobiles. The shopping center houses 60 retail stores leased to various businesses. One of the lessees is the Butler Shoe Co. Most of the stores, including Butler's, can be entered only from the interior mall.
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> In January 1971, warehouse employees of the Butler Shoe Co. went on strike to protest the company's failure to agree to demands made by their union in contract negotiations. The strikers

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[13] *Id.* at 521.

decided to picket not only Butler's warehouse but its nine retail stores in the Atlanta area as well, including the store in the North DeKalb Shopping Center. On January 22, 1971, four of the striking warehouse employees entered the center's enclosed mall carrying placards which read: "Butler Shoe Warehouse on Strike, AFL-CIO, Local 315." The general manager of the shopping center informed the employees that they could not picket within the mall or on the parking lot and threatened them with arrest if they did not leave. The employees departed but returned a short time later and began picketing in an area of the mall immediately adjacent to the entrances of the Butler store. After the picketing had continued for approximately 30 minutes, the shopping center manager again informed the pickets that if they did not leave they would be arrested for trespassing. The pickets departed. [Footnote omitted.][14]

The Court pointed out that the "basic objective under the Act," as stated in *Babcock & Wilcox*, is the "accommodation of § 7 rights and private property rights 'with as little destruction of one as is consistent with the maintenance of the other' "[15] and that the "primary responsibility" for making that accommodation rests with the Board. As the Court observed, "[t]he locus of that accommodation . . . may fall at differing points along the spectrum depending on the

[14] *Id.* at 509.

[15] *Id.* at 522, quoting *N.L.R.B.* v. *Babcock & Wilcox Co.*, 351 U.S. at 112.

nature and strength of the respective § 7 rights and private property rights asserted in any given context." [16]

The Court noted three factors distinguishing the instant case from *Central Hardware* and *Babcock & Wilcox* that "may or may not be relevant" in striking the *Babcock & Wilcox* balance:

> First, [the instant case] involved lawful economic strike activity rather than organizational activity. . . . Second, the § 7 activity here was carried on by Butler's employees (albeit not employees of its shopping center store), not by outsiders. . . . Third, the property interests impinged upon in this case were not those of the employer against whom the § 7 activity was directed, but of another. [Footnote omitted.][17]

In sum, the issue in this case is whether, without reference to first amendment considerations, the threat by Hudgens' agent in the circumstances here to cause the arrest of Butler's warehouse employees engaged in picketing Butler's retail outlet in Hudgen's shopping center, herein also called the Center or the Mall, violated Section 8(a)(1) of the Act.

As was noted by the Court, both *Babcock & Wilcox* and *Central Hardware* involved organizational activity carried on by nonemployees on the employer's property,[18] while the instant case involves lawful economic

[16] *Id.* at 522.

[17] *Id.* at 522.

[18] *Babcock & Wilcox* involved an employer's refusal to permit distribution of union literature by nonemployee union

picketing conducted by Butler's warehouse employees on property owned by Hudgens, the lessor of the property on which Butler's retail store is located. In this case, the Court's distinction between organizational and economic strike activity is to some degree intertwined with its employee-nonemployee distinction, in that in *Babcock & Wilcox* and *Central Hardware* the organizational activity in question was by nonemployee union organizers, whereas the economic picketing here was carried on by employees of the struck employer. We conclude that the three factual differences, i.e., the nature of the activity, the persons engaging therein, and the title to the property, do not

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organizers on company-owned parking lots. The Court there imposed no absolute requirement that the union have available no other means of communicating with the employees it desired to organize. Rather, the Court stated that, if the circumstances placed the employees beyond the reach of reasonable union efforts to communicate with them, the employer must allow the union to approach its employees on its property, because the right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others. As noted, the Court emphasized that under such circumstances "the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize." 351 U.S. at 112.

In *Central Hardware*, the company enforced its no-solicitation rule to prohibit nonemployee union organizers from soliciting employees in its parking lot. The Court held that the rationale of *Logan Valley, supra*, which rested on constitutional grounds, was inapplicable to a determination of whether Central had violated Sec. 8(a)(1) of the Act.

preclude our finding that Hudgens violated Section 8(a)(1).[19]

Concerning the first distinction noted by the Court, that the instant case involves economic strike activity rather than organizational activity, it is fully recognized by Board and Court precedent,[20] as well as by the parties to this proceeding, that both types of activity are protected by Section 7. Accordingly, economic activity deserves at least equal deference,[21] and the fact that the picketing here was in support of an economic strike does not warrant denying it the same measure of protection afforded to organizational picketing.

With respect to the Court's second distinguishing factor, that the picketers were employees of the com-

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[19] Member Murphy points out that, irrespective of fn. 30, the concurring opinion herein asserts, in effect, that the differences noted by the Supreme Court are of minimal importance in reaching the result. She disagrees with this approach. To the contrary, inasmuch as the Supreme Court pointed out the existence of these distinctions, it is essential that the Board consider and discuss their importance to the conclusion reached. Like her concurring colleague, she finds that they do not require a different result, but she has joined in attempting to explicate fully the reason for so finding.

[20] See, e.g., *N.L.R.B.* v. *International Rice Milling Co., Inc.*, 341 U.S. 665, 672 (1951); *Division 1287, Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America* v. *Missouri*, 374 U.S. 74, 82 (1963); *N.L.R.B.* v. *Erie Resistor Corp.*, 373 U.S. 221, 233-234 (1963); *United Steelworkers of America, AFL-CIO* [*Carrier Corporation*] v. *N.L.R.B.*, 376 U.S. 492, 499 (1964).

[21] In fact, economic activity by a recognized union is not limited as is organizational picketing by Sec. 8(b)(7).

pany whose store they were picketing rather than nonemployees, as were the union organizers in *Babcock & Wilcox*, it is basic that Section 7 of the Act was intended to protect the rights of employees rather than those of nonemployees. With this principle in mind, the employee status of the pickets here entitled them to at least as much protection as would be afforded to nonemployee organizers such as those in *Babcock & Wilcox*.

However, the fact that economic rather than organizational picketing is involved in this case may require a different application of the accommodation principle because of the different purposes sought to be served. It is clear that the Section 7 rights involved in *Babcock & Wilcox*, as in *Central Hardware*, are those of the employees rather than those of the nonemployees seeking to organize them. That is to say, if the employees are beyond the reach of reasonable union efforts to communicate with them, it is the employees' right to receive information on the right to organize that is abrogated when an employer denies nonemployee union organizers access to the employer's property. Similarly, where, as here, economic strike picketing is involved, the Section 7 rights at issue are those of employee, i.e., the pickets' right to communicate their message both to persons who would do business with the struck employer and to those employees of the struck employer who have not joined the strike.

One difference between organizational campaigns as opposed to economic strike situations is that in the

former the Section 7 rights being protected are those of the intended audience (the employees sought to be organized), and in the latter the Section 7 rights are those of the persons attempting to communicate with *their* intended audience, the public as well as the employees. A further distinction between organizational and economic strike activity becomes apparent when the focus shifts to the characteristics of the audience at which the Section 7 activity in question is directed. In an organizational campaign, the group of employees whose support the union seeks is specific and often is accessible by means of communication other than direct entry of the union organizers on to the employer's property, such as meeting employees on the street, home visits, letters, and telephone calls.

Here, the pickets' intended audience comprised two distinct groups: (1) those members of the buying public who might, when seeing Butler's window display inside the Mall, think of doing business with that one employer, and (2) the employees at the Butler store. Although the nonstriking employees at the Butler store were obviously a clearly defined group, the potential customers (the more important component of the intended audience) became established as such only when individual shoppers decide to enter the store.

Hudgens contends that *Babcock & Wilcox* should be read to require that, if television, radio and newspaper advertising is available, the picketers' Section 7 rights must yield to property rights regardless of

the expense involved and regardless of the fact that such forms of communications, in order to reach the intended audience, necessarily must also reach the general populace. As to these contentions, the Administrative Law Judge found, and we agree, that the mass media, appropriately used by the North DeKalb Center and its merchants to attract customers from the Metropolitan Atlanta area, are not "reasonable" means of communication for employee pickets seeking to publicize their labor dispute with a single store in the Mall.[22] Furthermore, Hudgens' suggested approach would undercut Board and Court precedent recognizing and protecting such picketing as the most effective way of reaching those who would enter a struck employer's premises, including situations in which the entrance to the employer's property is on land owned by another.[23]

Hudgens further argues that the Union had other means of access to the public using the Mall in that it could have picketed on the private sidewalk around the Center building or on the public streets and sidewalks near the Center's parking lot. As to the

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[22] 205 NLRB 628, 631.

[23] See, e.g., *United Steelworkers of America* v. *N.L.R.B.*, *supra* at 499. In *Steelworkers*, the union engaged in primary picketing at several entrances to the employer's plant. One of the entrances was a gate for railroad personnel and owned by the railroad. In holding that the union's picketing of the employer on the railroad's private property was not a violation of Sec. 8(b)(4) of the Act, the Court noted that the "location of the picketed gate upon New York Central property has little, if any, significance."

first of these proposed locations, we find, in agreement with the Administrative Law Judge, that the only question the Board is called upon to decide was whether the employees had the right to picket immediately in front of the Butler store in the general walking area used by the invited public inside the Mall. Although the individual who was Hudgens' manager at material times in this proceeding testified that he told the pickets they could picket on the parking lot, the Administrative Law Judge discredited this testimony and noted that even in its brief Hudgens maintained that it had the right to eject pickets from the parking lot as well. As to Hudgens' suggestion that the pickets could have used public streets and sidewalks, the Administrative Law Judge pointed out that Butler is only 1 of 60 stores fronting on the same common inside walkways, that the closest public area—i.e., not privately owned—is 500 feet away from the store, and that a message announced orally or by picket sign at such a distance from the focal point would be too greatly diluted to be meaningful. Further, we find merit in the General Counsel's contentions that safety considerations, the likelihood of enmeshing neutral employers, and the fact that many people become members of the pickets' intended audience on impulse all weigh against requiring the pickets to remove to public property, or even to the sidewalks surrounding the Mall.

As for the third consideration noted by the *Hudgens* Court, that "the property rights impinged upon . . . were not those of the employer against whom

the § 7 activity was directed, but of another," we find that, under the circumstances here, Hudgens' property right to exclude certain types of activity on his Mall must yield to the Section 7 right of lawful primary economic picketing directed against an employer doing business on that Mall. The walkways on the common area of the Mall near the Butler store, although privately owned, are, during business hours, essentially open to the public and, as the General Counsel argues, are the equivalent of sidewalks for the people who come to the Center. Thus, the invitation to the public,[24] as recognized by Hudgens in the "Shopping Center Lease" form and publicized in various advertising and promotional campaigns, is simply "Come to the North DeKalb Center." Specific intent to buy is not a prerequisite to invitee status; the fact that many people buy on impulse is explicitly recognized in the design and layout of the Center's commercial environment. As members of the public, the men who carried the signs were apparently within the scope of the invitation and welcome as long as they did not picket.[25]

Further, we find no merit to Hudgens' assertion that he is a completely neutral bystander in this situation. Although Hudgens is neutral in the sense that he is not the primary employer and is, therefore, not a party to the labor dispute, he is nonetheless

[24] The invitation is to the public in the sense that all members of the public are considered potential customers.

[25] Harold Glenn, one of the pickets, testified that they were told: "You can stay but those signs have got to go."

financially interested in the success of each of the businesses in his Center inasmuch as he receives a percentage of their gross sales as part of his rental arrangement. He provides security and other services on a purportedly neutral basis to assure customer comfort and well-being in order that sales potential be maximized. Although in some ways the security services provided by Hudgens are analogous to those provided by police in the public shopping areas of any town, there are distinctions; e.g., Hudgens' security force can, and as the record shows does, preclude certain types of behavior on the Mall that police could not prohibit on a public street. As the Court made clear, there is no first amendment right to enter such shopping centers to engage in activities that would be accorded first amendment protection in a public street or park.

To the extent that Hudgens' security force protects the Center and its businesses from such activities as, in Hudgens' view, might discomfit, discourage, or intimidate shoppers, Hudgens is protecting his own interests. To the extent that the businesses on the Mall have delegated to Hudgens responsibility for the maintenance of an environment that maximizes the shoppers' peace of mind, and therefore sales, those doing business at the Center are protecting their own interests through Hudgens. By the terms of the lease, part of the rent they pay Hudgens is for such protection.

Furthermore, although Hudgens owns the Mall, as long as the shopkeepers pay their rent, they have

certain rights in the leased property. One of these is the right to have the walkways of the Mall accessible to persons who wish to shop there. Without that right, the leaseholds would, obviously, be worthless. In maintaining the comfort, cleanliness, and security of the Mall, Hudgens is, in a real sense, acting for the shopkeepers who lease their store locations from him. To this degree, he is their agent and, in light of his direct interest in seeing the shopkeepers' profits maximized, his interests in performing the above activities are mutual with those of the shopkeepers.

Picketing in support of an economic strike is intended to have, and certainly may have, economic effects on the struck business. This is true whether the picketing occurs on public or private property. Such activity is a corrollary of the strike itself and is the means by which the striking employees communicate their message to those who would do business with the employer as well as to other employees of the employer. Here, the activity of the pickets in front of the Butler store clearly could affect Hudgens' interests adversely: to the degree Butler's gross sales are diminished, Hudgens' rental percentage figure will likewise be reduced. Furthermore, as a result of our finding that in the circumstances here such picketing is permissible, businesses may find that mall locations are less desirable since such locations will be more insulated from such Section 7 activity than are locations fronting a public sidewalk. To the

extent that this makes mall locations less attractive to businesses seeking retail store sites, Hudgens' interests are further jeopardized.

However, in finding that the *Babcock & Wilcox* criteria are satisfied and that, in these circumstances, Hudgens' property rights must yield to the pickets' Section 7 rights, we are simply subjecting the businesses on the Mall to the same risk of Section 7 activity as similar businesses fronting on public sidewalks now endure. In leasing the shops to the merchants, Hudgens necessarily submitted his own property rights to whatever activity, lawful and protected by the Act, might be conducted against the merchants had they owned, instead of leased, the premises. The effect of our decision obviously is limited to such Section 7 activity and in no way requires Hudgens to open the Mall to any and all who may wish to demonstrate or solicit there. As the *Hudgens* Court made clear, no first amendment considerations are involved.

It is clear, then, that by our holding here we do no more than assure that employees of employers doing business in such malls will be afforded the full protection of the Act. In our view, the national labor policy requires that such employees be afforded that protection. A contrary holding would enable employers to insulate themselves from Section 7 activities by simply moving their operations to leased locations on private malls, and would thereby render Section 7 meaningless as to their employees.

On the basis of all the foregoing, we reaffirm our previous conclusion that the respondent, by threatening to cause the arrest of Butler's warehouse employees engaged in picketing Butler's retail outlet in Respondent's shopping center violated Section 8(a)(1) of the Act. Accordingly, we shall reaffirm our original Order in this proceeding.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby reaffirms its Order previously issued herein and orders that the Respondent, Scott Hudgens, Atlanta, Georgia, his agents, successors, and assigns, shall take the action set forth in the Board's Decision and Order (192 NLRB 671), and Supplemental Decision and Order (205 NLRB 628).

Dated, Washington, D.C. June 23, 1977

HOWARD JENKINS, JR., Member

JOHN A. PENELLO, Member

BETTY SOUTHARD MURPHY, Member

PETER D. WALTHER, Member

NATIONAL LABOR RELATIONS BOARD

[SEAL]

CHAIRMAN FANNING, concurring:

When *Hudgens II* [26] was argued before the United States Court of Appeals for the Fifth Circuit, the Board attempted to support its finding that Hudgens violated Section 8(a)(1) by reference to *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U.S. 793 (1945). To the extent that tack undermined the exclusive reliance upon statutory, as opposed to constitutional, considerations which the language of our decision in *Hudgens II*, as well as that of our prior decision in *Peddie Buildings*,[27] evinced, it was regrettable. For the Board decisions in *Hudgens II* and *Peddie*, were, in my view, based solely upon application of the *Babcock & Wilcox* test. To the further extent the majority opinion, with which I have little quarrel, fails to make that clear, I believe the matter should be emphasized. All, in my judgment, that is involved in the proceeding is that clarification. For, all this proceeding more specifically involves, as did the immediately prior *Hudgens*, is a reasoned accommodation between the rights vested in Hudgens by virtue of the title he holds to real property immediately in front of a mall store and certain legal rights vested in covered employees of a covered employer by virtue of this statute.

As in *Hudgens II*, that accommodation is, in my judgment, on the facts presented, more reasonably struck on the side of the covered employees. That

[26] *Scott Hudgens*, 205 NLRB 628 (1973).

[27] *Frank Visceglia and Vincent Visceglia, t/a Peddie Buildings*, 203 NLRB 265 (1973).

Babcock involved organizational activity and this case peaceful, primary, and protected picketing is, in my judgment, irrelevant, and, notably, no litigant to the controversy contends otherwise. The Congress has repeatedly concluded "that a strike when legitimately employed is an economic weapon which in great measure implements and supports the principles of the collective bargaining system."[28] As we stated in *Peddie*, it is a right "embodied in Section 7 and . . . given emphasis in Section 13." And, if the matter need be further underscored, it is a right specifically designed to foster the equality of bargaining power that is the entire statute's goal. The right to picket is so intertwined with the right to strike that the two amount to statutory equivalents.[29]

That *Babcock* involved activity undertaken by nonemployees and this case that of employees is, on the other hand, relevant but only to the extent that it more persuasively points to the result reached. If, as in *Babcock*, the rights of the passive audience addressed were considered paramount, certainly, here, the rights of those actively asserting the statutory right should be accorded even greater deference.

Finally, that the property right in *Babcock* was vested in the employer against whom the protected activity was directed and, in this case, in a third

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[28] *N.L.R.B.* v. *Erie Resistor Corp.*, 373 U.S. 221, 234 (1963).

[29] See, e.g., *N.L.R.B.* v. *Drivers, Chauffeurs, Helpers, Local Union No. 639, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America* [*Curtis Bros., Inc.*], 362 U.S. 274, fn. 9 (1960).

party, matters, from the standpoint of those asserting the statutory right, little (*United Steelworkers* [*Carrier Corp.*] v. *N.L.R.B.*, 376 U.S. 492, 499), and from the standpoint of the property right holder who chooses to become a lessor not much, if any, more.

The balance to be struck in this case, therefore, no more favors this Respondent than the *Babcock* one.[30] As our decisions in *Hudgens II* and *Peddie*, the case upon which we relied in *Hudgens II*, make, I believe, clear, a variety of considerations point toward finding a violation. The self-imposed limitations on exclusive use that Hudgens created, the significant diminishment of the employee right involved that the available alternatives for the picketing constitute, and the possibility that the avilable alternatives would enmesh a number of other employers surely more "neutral" to the dispute than Hudgens require striking the balance on the employees' side. I concur, therefore, in my colleagues' disposition.

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[30] Contrary to Member Murphy's understanding of my position, I do not regard the differences noted by the Supreme Court between this case and *Babcock & Wilcox* as of minimal importance in reaching the result in this case. The Court stated the three differences "may or may not be relevant," and I conclude for the same, if more briefly stated, reasons as do my colleagues, that the first is not, the second is, and the third is too, but only slightly. Which is, of course, to say, that the differences, to the extent they are relevant, make this a stronger case than was *Babcock & Wilcox* for finding the violation of Sec. 8(a)(1) found by the Board herein. I do not understand how my position can fairly be characterized as minimizing the importance of those differences to a decision herein.

Dated, Washington, D.C. June 23, 1977

JOHN H. FANNING, Chairman
NATIONAL LABOR RELATIONS BOARD

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